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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

IN RE GOOGLE PLAY STORE
ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO:

Epic Games Inc. v. Google LLC et al., Case
No. 3:20-cv-05671-JD

Case No. 3:21-md-02981-JD

**GOOGLE'S OBJECTIONS TO
PROPOSED VERDICT FORM**

Judge: Hon. James Donato

Pursuant to the Court’s Order, Google submits the following objections to the proposed verdict form, MDL ECF No. 851.

First, Google objects to Question 1 of the verdict form, which asks whether “Google willfully acquired or maintained monopoly power in a relevant antitrust market.” This Question is likely to mislead the jury because it suggests that the acquisition of monopoly power is illegal even absent any element of anticompetitive conduct. But “[t]o safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*.” *Verizon Commc’ns Inc. v. L. Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004). “The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system.” *Id.* At a minimum, the Court should modify this question as follows: “Did Epic prove, by a preponderance of the evidence and in accordance with the instructions given to you, that Google willfully acquired or maintained monopoly power in a relevant antitrust market *through the use of anticompetitive conduct*?”

Second, Google objects to asking the market definition questions after asking the jury other liability-related questions. Market definition is a “threshold step” in evaluating an antitrust claim, *FTC v. Qualcomm*, 969 F.3d 974, 992 (9th Cir. 2020), and the trier of fact cannot assess liability without first defining the relevant market, *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2285 (2018) (“courts usually cannot properly apply the rule of reason without an accurate definition of the relevant market.”). “Without a proper definition of the relevant market, it is impossible to determine a party’s influence over that market.” *Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1203 (9th Cir. 1997). The jury must first make its market-definition findings before continuing its analysis. If Epic has not proven its alleged relevant markets, then Epic cannot succeed on its claims. *Coronavirus Reporter v. Apple, Inc.*, 85 F.4th 948, 957 (9th Cir. 2023) (holding that a relevant market is necessary to an antitrust claim).

Third, Google preserves its objection to allowing the jury to find liability on any market other than that which Epic has alleged. *See* MDL ECF No. 806 at 37. “Failing to define a relevant market alone is fatal to an antitrust claim.” *Coronavirus Reporter*, 85 F.4th at 957;

1 *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, 375 F.3d 1341, 1363 (Fed. Cir. 2004)
 2 (reversing an antitrust verdict because no evidence supported the plaintiff's technology market
 3 definition), *rev'd on other grounds*, 546 U.S. 394 (2006). Although *Coronavirus Reporter* was
 4 decided on the pleadings, it states a rule of law that applies at trial as well. Epic has not cited any
 5 case holding that a jury can find a market other than a market plaintiff attempted to prove. *Epic*
 6 *Games v. Apple, Inc.*, 67 F.4th 946 (9th Cir. 2023), involved a bench trial where the district court
 7 issued findings of fact and conclusions of law sufficient to enable appellate review. The same
 8 would not be true of a jury that found a market that Epic has not alleged.

9 *Fourth*, Google objects to Epic's individual claims not being addressed separately because
 10 it could lead to an ambiguous verdict. If, for example, the jury wrote in more than one market in
 11 response to Question 2, and then answered "yes" to Question 3, the verdict form would be
 12 ambiguous as to whether the jury found injury in one market, the other, or both. A similar risk
 13 attaches to Questions 5 through 7. Question 5 permits the jury to find multiple agreements
 14 unlawful, Question 6 permits the jury to find more than one relevant market, and asks for no
 15 connection between the two questions. And if the jury then answers "yes" to Question 7, which
 16 asks about injury, many different meanings could attach to that answer, but the verdict form would
 17 not specify which. That would hinder future review of the verdict because any reviewer would be
 18 left to guess the specifics of the jury's findings.

19 *Fifth*, Google objects to the same conduct being submitted to the jury twice—first as a
 20 generic Section 1 claim and second as a tying claim—because there is a risk of an inconsistent
 21 verdict and juror confusion. *See* MDL ECF No. 832 at 16. For example, the jury might not find
 22 the DDA was an unreasonable restraint of trade in response to Question 5, but still find against
 23 Google on the tying claim (or vice versa), despite the DDA being the subject of both of those
 24 claims. Moreover, because there are no predicate market definition questions (unlike Questions 2
 25 and 6) or market power questions for the tying claim, there is a risk that the jury will find tying
 26 without finding the DDA to be an unreasonable restraint of trade. To avoid the risks of an
 27 inconsistent verdict and juror confusion, the DDA should only be put to the jury once—as a tying
 28

1 claim—and the verdict form should ask the jury about the elements of the tying claim, as Google
2 suggested in its proposed verdict form. *See* MDL ECF No. 832 at 10-11.

3 *Sixth*, Google objects on grounds that a more detailed verdict form is essential if the Court
4 is to weigh an illegality defense. If the jury finds against Google, knowledge of the markets and
5 agreements that the jury found unlawful will be necessary in order to evaluate Epic’s illegality
6 defense. *See Kelly v. Kosuga*, 358 U.S. 516, 520 (1959) (Courts should not strike down contract
7 as illegal “[p]ast the point where the judgment of the Court would itself be enforcing the precise
8 conduct made unlawful by the Act”).

9 *Finally*, Google objects that its breach of contract counterclaim should be submitted to the
10 jury because there has been no entry of judgment as a matter of law in Google’s favor
11 notwithstanding Epic’s concessions with respect to breach and damages. *See* MDL ECF No. 832
12 at 16; U.S. CONST. AMEND. VII.

1 DATED: December 7, 2023

Respectfully submitted,

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